

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF: *

FABRICIO & VIVIANE FIDELIS, d/b/a *

FLOWER VALLEY LANDSCAPING, INC *

Petitioners *

*

Fabricio Fidelis *

For the Petitioner *

*

David C. Gardner, Esquire *

Attorney for Petitioners *

***** *

Martin Klauber, Esquire *

People's Counsel *

In Support of the Petition *

***** *

Board of Appeals No. S-2695
(OZAH Referral No. 07-19)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND	3
A. The Subject Property and the General Neighborhood	3
B. Proposed Use	11
C. The Environment	18
D. The Master Plan	19
E. Transportation Facilities	20
F. Community Concerns	21
III. SUMMARY OF THE HEARING	23
A. Petitioners' Case	23
B. People's Counsel	28
IV. FINDINGS AND CONCLUSIONS	28
A. Inherent and Non-Inherent Adverse Effects	28
B. General Standards	30
C. Specific Standards: Landscape Contractor	35
D. General Development Standards	37
V. RECOMMENDATIONS	40

I. STATEMENT OF THE CASE

On January 19, 2007, Petitioners Fabricio and Viviane Fidelis, d/b/a Flower Valley Landscaping, Inc., filed a petition for a Landscape Contractor Special Exception under Zoning Ordinance §59-G-2.30.00. Petitioners seek the special exception to legitimize their existing landscaping business on a 6.27 acre property they own at 7420 Damascus Road, Gaithersburg, Maryland.¹ The subject site is comprised of two parcels, Part of Lot 28 and Part of Parcel 56, in the Seneca Valley Estates Subdivision. It is zoned RDT (Rural Density Transfer), which permits Landscape contractors by special exception. Only a 0.73 acre portion of the site is used for the landscaping business.

By notice dated February 9, 2007, the Board of Appeals scheduled a hearing in this matter for June 8, 2007, before the Hearing Examiner. Exhibit 12. On May 18, 2007, the Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC) filed its Report (Exhibit 19)², which recommended approval of the petition, with conditions. On June 1, 2007, the Montgomery County Planning Board voted unanimously to approve the petition with the same conditions recommended by the Technical Staff (Exhibit 19). The only opposition came in the form of a letter from Petitioners' next-door neighbor, Saiid Bina (Exhibit 14).

To address concerns raised by Petitioners' neighbor and by Technical Staff, a motion to amend the petition was filed in letters dated May 3, May 9 and May 21, 2007 from Petitioners' attorney, David C. Gardner, Esquire. A notice was issued on May 23, 2007 (Exhibit 23), and the motion was taken under consideration for a 10 day period, until June 4, 2007. The only response received was from neighbor Saiid Bina, who expressed his fear that the landscaping business would grow and his wish that this "illegitimate business" should cease. Since none of these points addressed the question of amending the petition, the amendment was granted at the inception of the hearing. Tr. 4-5.

¹ Petitioners were cited on April 11, 2007, by the Department of Permitting Services (DPS) for operating a landscape business without a special exception (Exhibit 26).

² The Technical Staff Report, Exhibit 19, is frequently quoted and paraphrased herein.

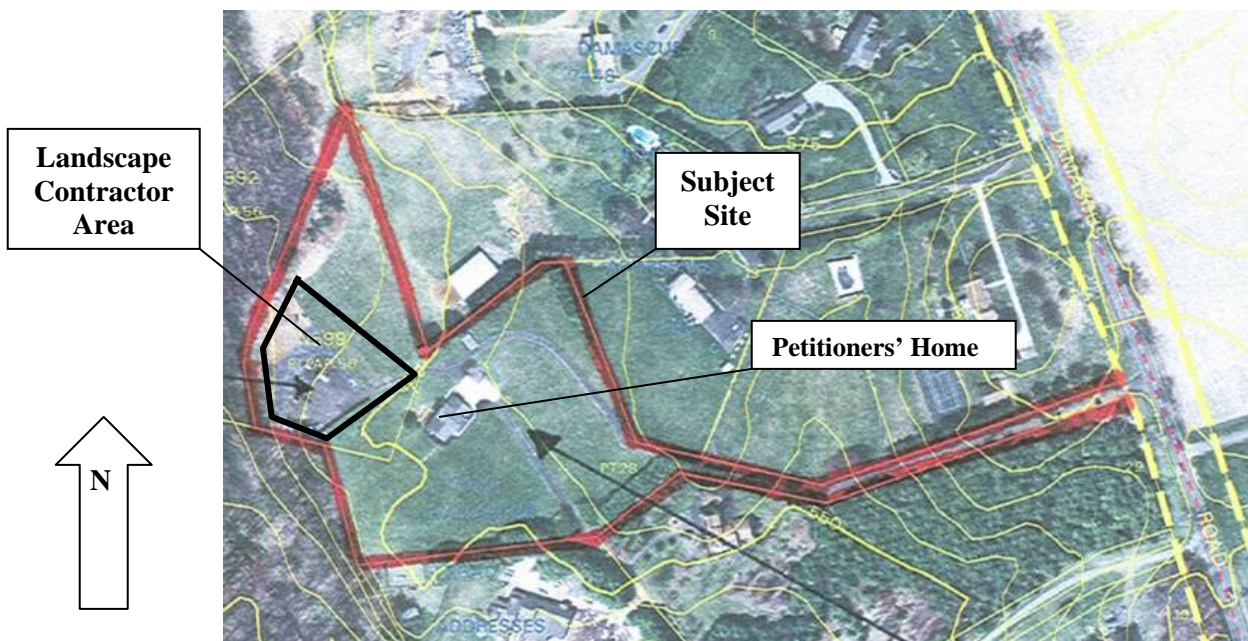
The hearing went forward as scheduled on June 8, 2007. There was no opposition at the hearing, and the Petitioners called only one witness, Fabricio Fidelis. They also adopted the findings, analysis and conclusions in the Technical Staff report as their own testimony (Tr. 70-71), and relied heavily on representations made by counsel. Therefore, all representations made by Petitioners' counsel at the hearing and in filings included in the record are hereby identified as having been relied upon by the Hearing Examiner.

The record was held open until June 15, 2007 to give Petitioners the opportunity to file a copy of their deed, an affidavit of posting and a revised landscape and lighting plan. They did so on June 13, 2007 (Exhibit 28). The record closed as scheduled on June 15, 2007.

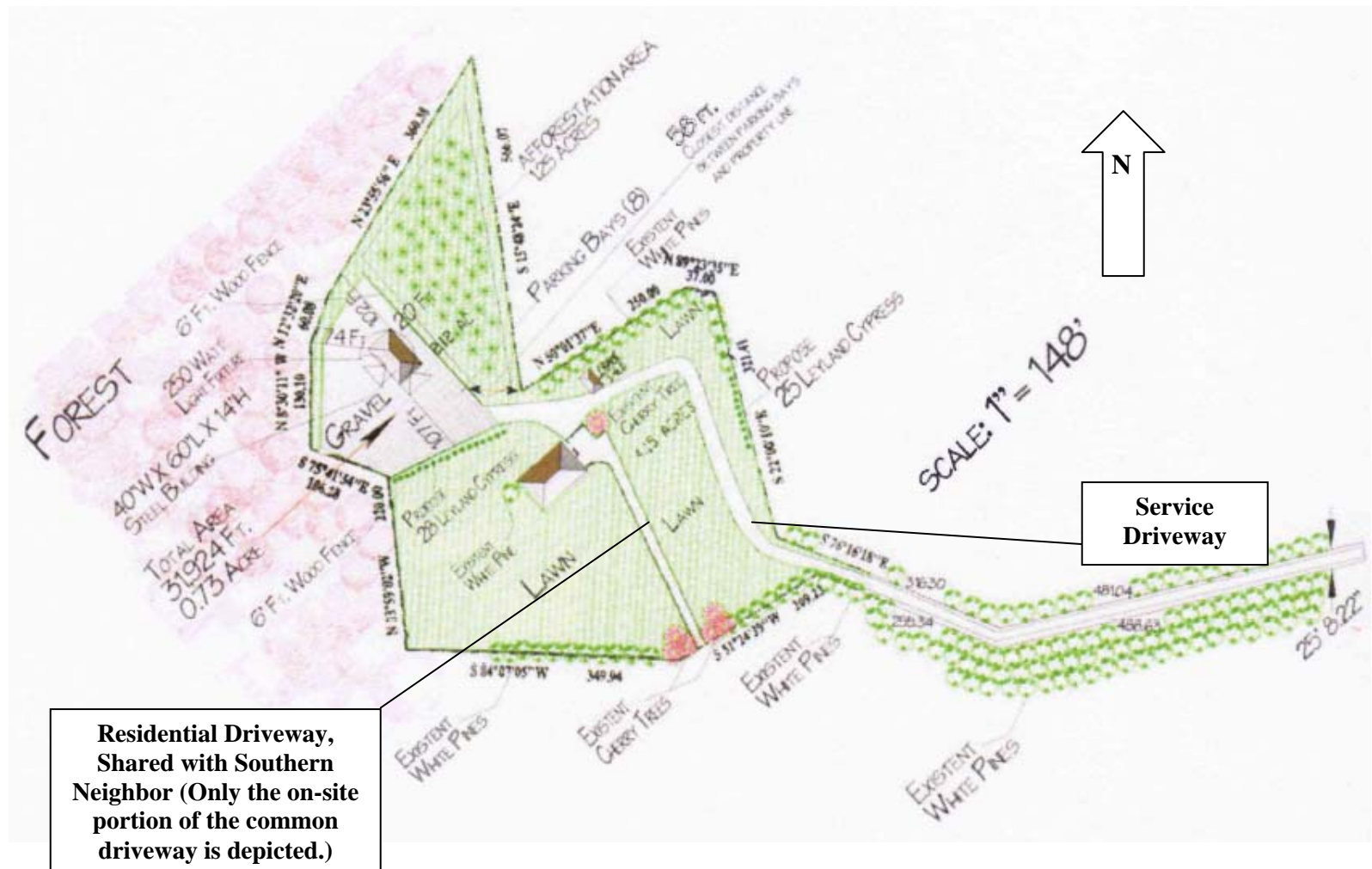
II. FACTUAL BACKGROUND

A. The Subject Property and the General Neighborhood

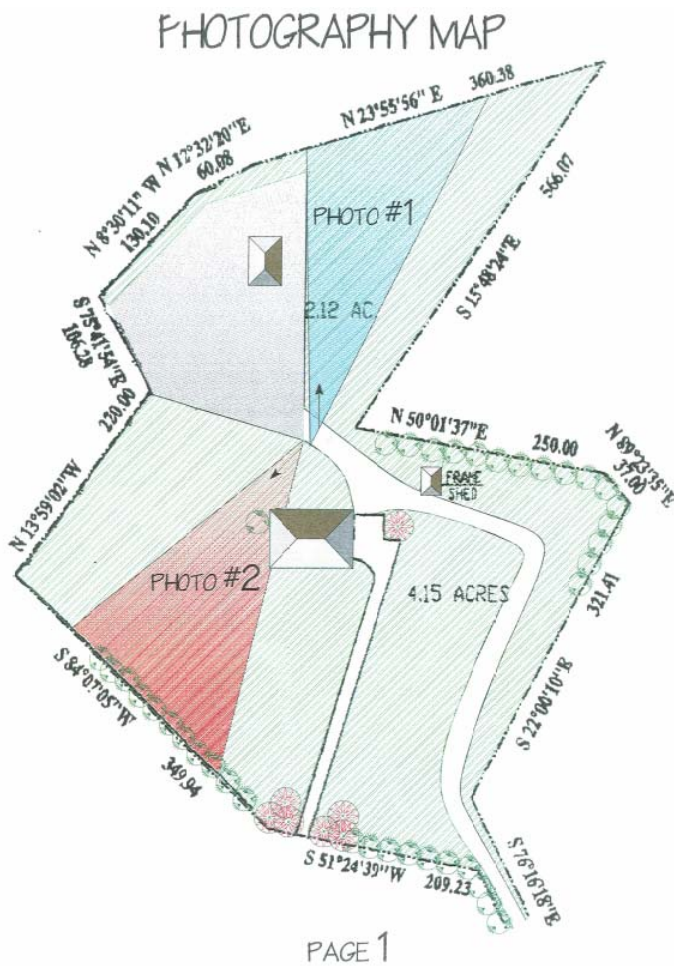
The subject property is located on the west side of Damascus Road (MD 108) approximately 500 feet south of its intersection with Annapolis Rock Road. As mentioned above, it consists of approximately 6.27 acres of land, of which only a 0.73 acre portion of the site is used for the landscaping business. The remainder of the site is used as Petitioners' residence. It can be seen below on a portion of the aerial photo attached to the Technical Staff report (Exhibit 19):



The site is connected to Damascus Road by two driveways constructed within narrow easements. According to Technical Staff, the driveway on the south side of the property measures approximately 1,400 feet in length, and it provides common access to the street for Petitioners' existing home and for the neighboring residential properties to the south (Saiid Bina). The second driveway, which is constructed within a 40-foot-wide easement, is dedicated for the exclusive use of the proposed landscape contractor's business and traverses from Damascus Road, through the east and north side of Part of Lot 28, and ends at the proposed parking area for the special exception use (the portion of the site in Part of Parcel 56). This gravel service driveway measures 20 feet wide at the entrance, but the entrance will be expanded to a width of 25 feet to meet State Highway Administration (SHA) requirements. The driveway narrows to a width of 10 feet in parts, and it is approximately 1375 feet long. These features can be seen below on the original landscape plan (Exhibit 5):



The property is improved with a two-story, single-family dwelling, a small shed, and a gravel parking area. A 2,400 square-foot (60'L x 40'W x 14'H), steel building for equipment and vehicle storage is under construction on a portion of the parking area.³ The remainder of the property is defined by open lawn with a few mature trees located at the northeastern corner of the property and along the southern property line. Captioned photos of the site are shown below and on the following pages (Exhibit 8(a) – (f)), next to Photo Maps (Exhibits 10(a) – (d)) that show the directions in which the pictures were taken:



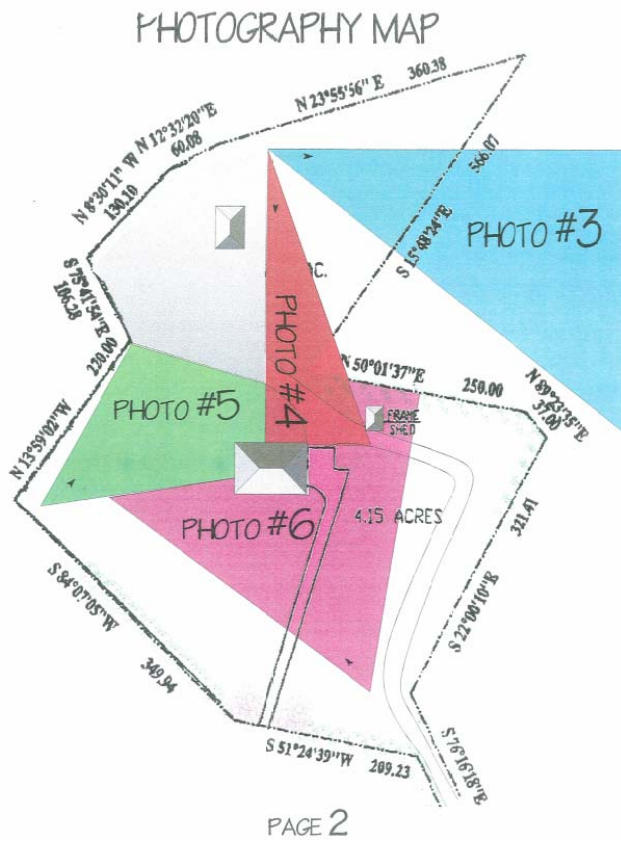
1



2



³ Petitioners have a building permit for this structure, but there are issues relating to it which will be discussed below.



3



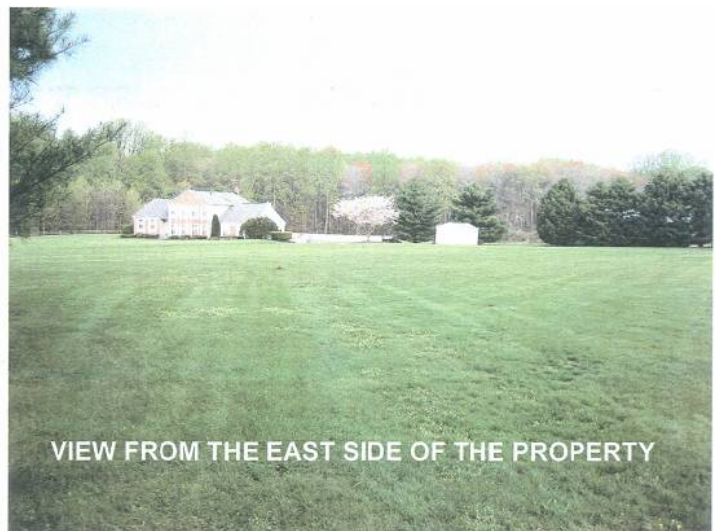
4



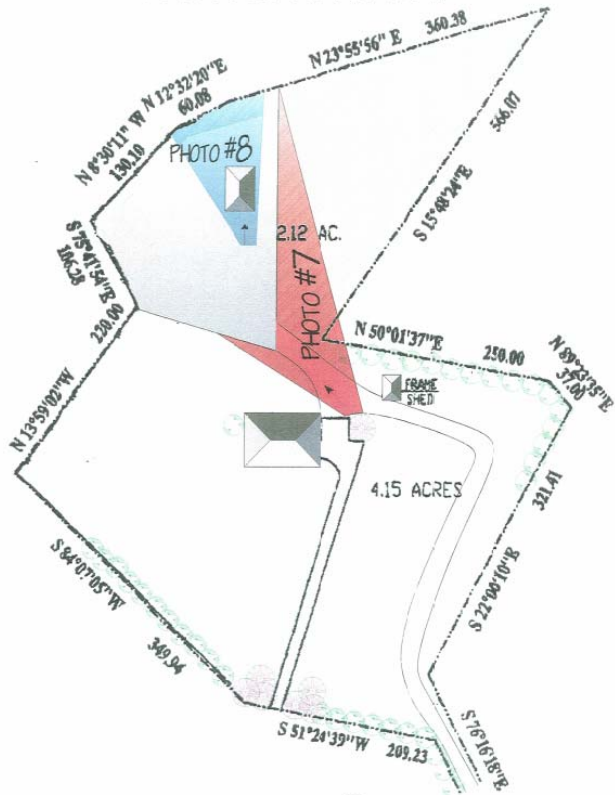
5



6



PHOTOGRAPHY MAP



PAGE 3

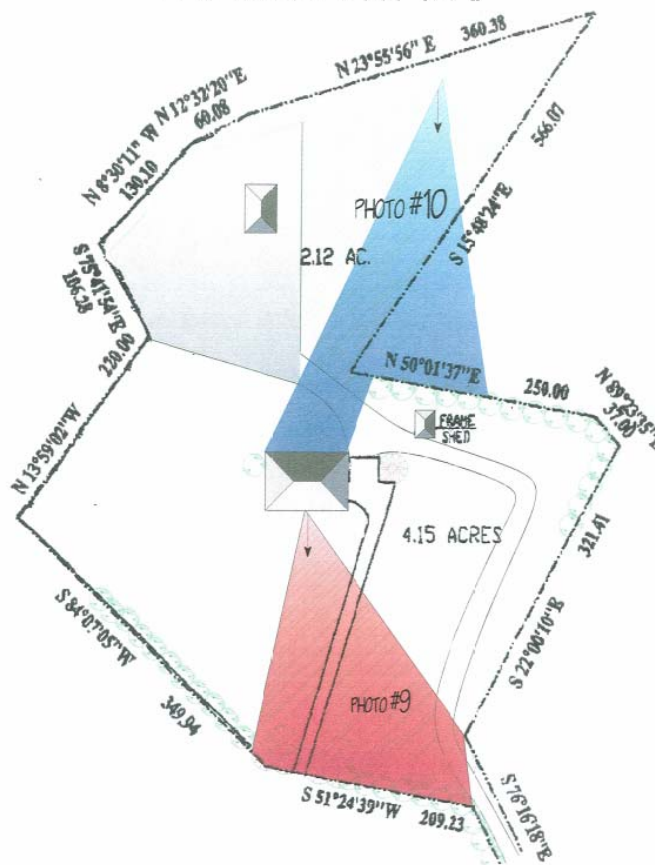
7



8

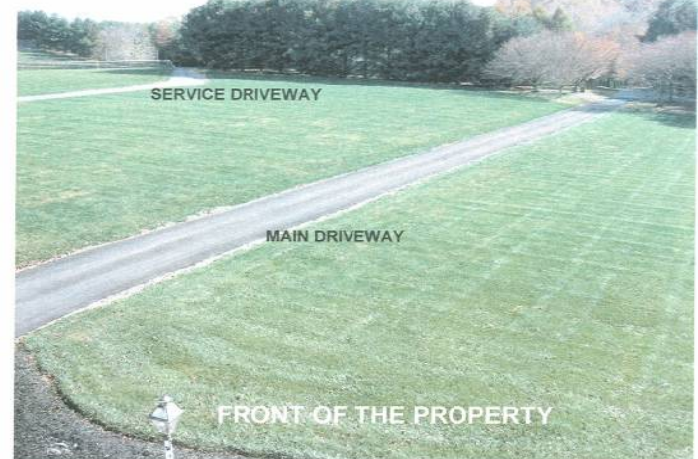


PHOTOGRAPHY MAP



PAGE 4

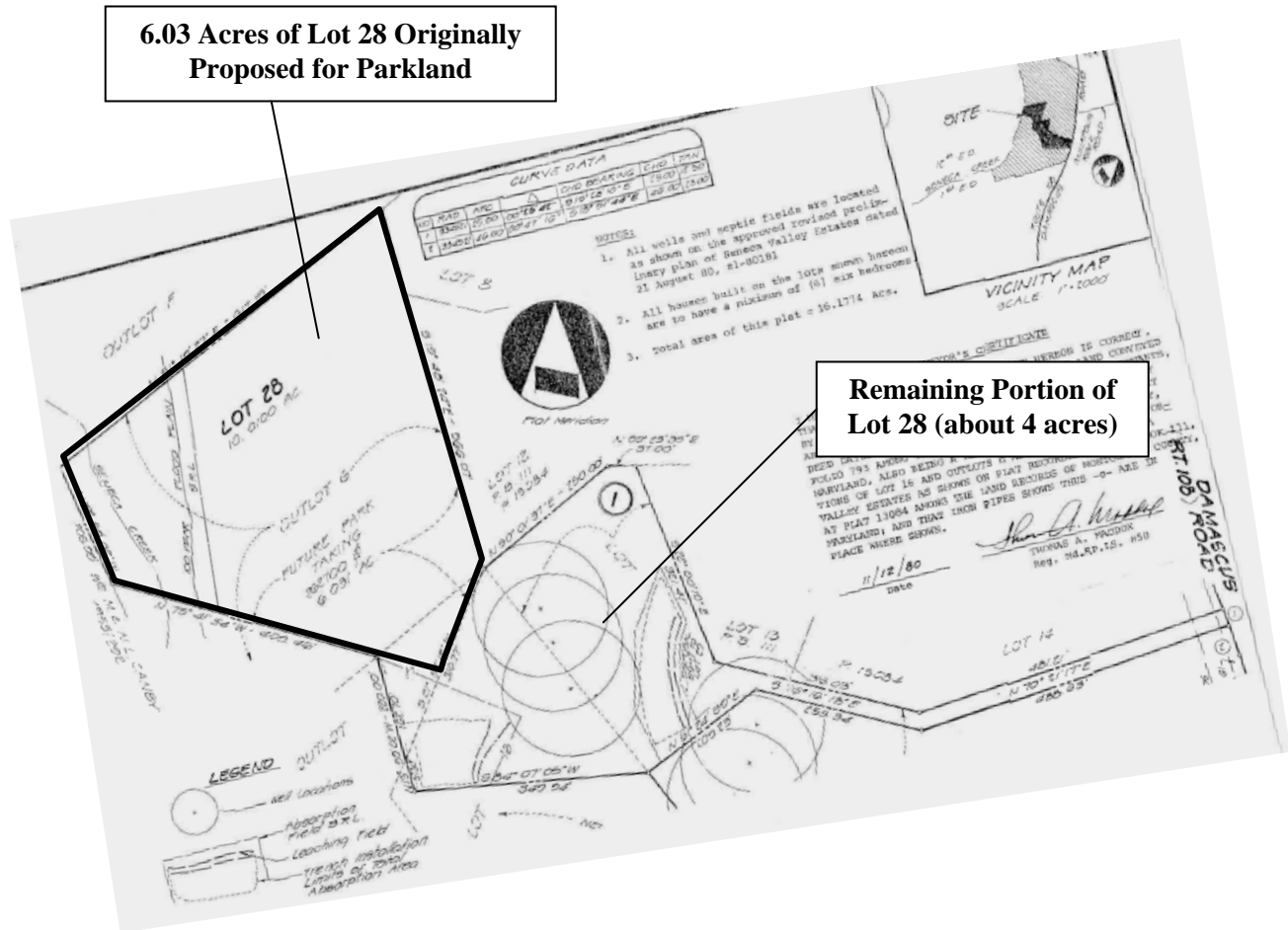
9



10

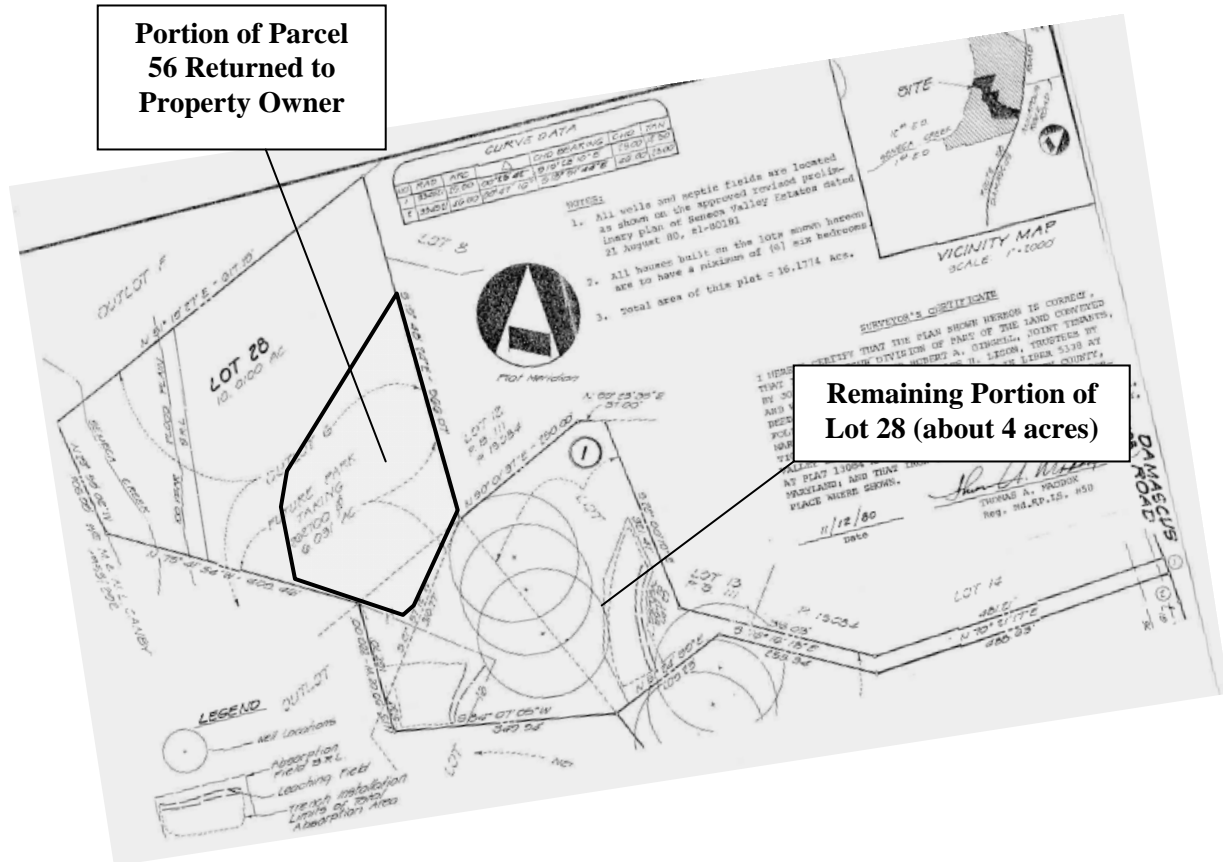


There is one unusual condition relating to the site which should be discussed. As mentioned previously, the property is composed of two parts, Part of Lot 28 and Part of Parcel 56. Originally, the entire property (and more) was included in Lot 28, as shown on the 1980 Plat set forth below (Exhibit 27):

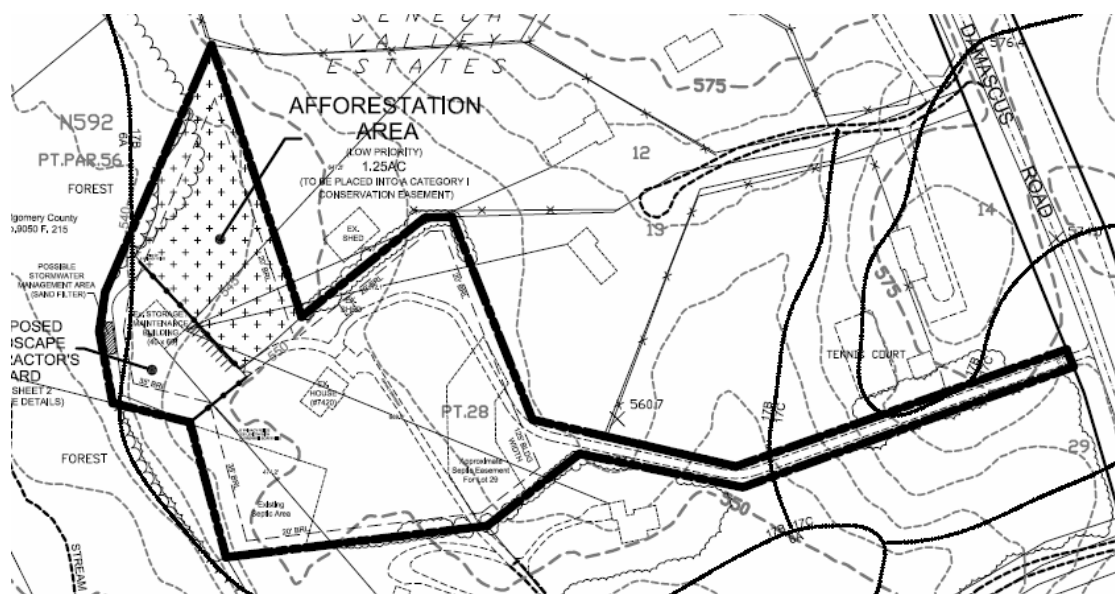


The original Lot 28, shown above, contained 10.01 acres. Tr. 29. In 1986, 6.03 acres of the original Lot 28 was dedicated and reserved for use by the government as parkland. See April 24, 2007 memorandum from Development Review Division attached to the Technical Staff report (Exhibit 19) and Tr. 29-31. That portion was called Parcel 56. The Hearing Examiner has outlined that proposed parkland area (Parcel 56) on the above plat.

The government later decided, however, that it did not need all of the 6.03 acres dedicated for parkland, so it actually acquired under 4 acres of Parcel 56 from the landowner, leaving Part of Parcel 56 (about 2.27 acres), as shown on the Hearing Examiner's outline below:

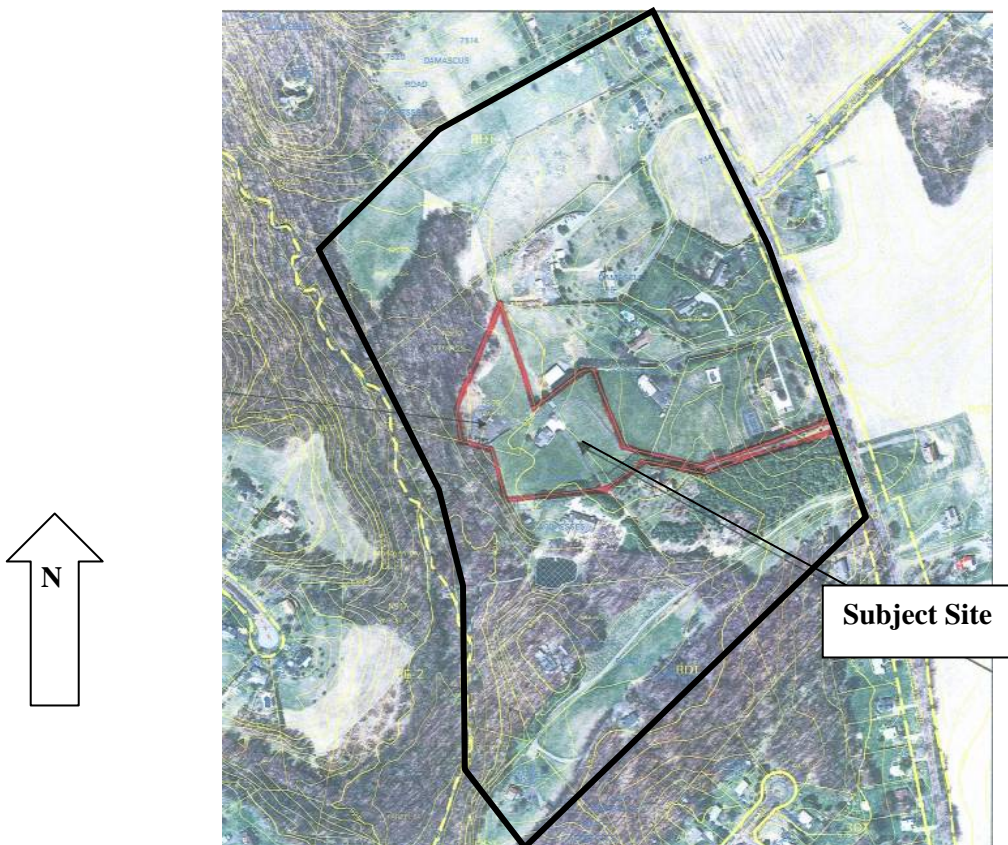


The remainder of Parcel 56, plus the remainder of the original Lot 28, now constitute the 6.27 acre subject site, as shown below on a portion of the revised Site Plan (Exhibit 18(k)):



The significance of this convoluted tale is that Petitioners' metal storage and garage building (depicted on page 7 of this report) is being constructed on Part of Parcel 56, which is an unrecorded lot. Despite this fact, the Department of Permitting Services (DPS) issued a permit for that construction, apparently believing that the site was the recorded Lot 28. *See* Permit No. 421135, attached to the Technical Staff report. Technical Staff notes that the property should be subdivided to remedy this problem (Exhibit 19, pp. 8-9 and 17-18), but because the permit has already been issued, they have “defer[red]” to the Board of Appeals to decide if Petitioners must apply for subdivision. The Hearing Examiner concludes that this situation should be remedied by subdivision, and recommends a condition requiring Petitioners to apply for subdivision. Pursuant to Zoning Ordinance §59-G-1.21(a)(9)(i), “subdivision approval must be included as a condition of the special exception” when subdivision is needed. The Hearing Examiner has therefore also recommended that such Planning Board approval of the subdivision be a condition of the special exception.

Technical Staff defined the general neighborhood as bordered by Damascus Road to the east, the Great Seneca Creek to the west, and including all the properties within Seneca Valley Estates, as outlined by the Hearing Examiner below on the map attached to the Technical Staff report.



Petitioners do not dispute this definition; however the concept of neighborhood is hard to define in a rural area. *Montgomery v. Board of County Commissioners for Prince George's County*, 263 Md. 1, 7-8, 280 A.2d 901, 903 (1971). Both the western and eastern borders of the neighborhood, as defined by Technical Staff, have an obvious logic because, on the west there is Great Seneca Creek, and on the East there is a major highway, Damascus Road. Technical Staff has proposed to establish the northern and southern borders of the neighborhood approximately 1,000 to 1200 feet away from the subject site, encompassing the Seneca Valley Estates Subdivision. Given the minimal impact traffic from the site will have upon the neighborhood (19 peak hour trips in both the morning and evening peak periods according to the Transportation Staff Memo of May 9, 2007, attached to Exhibit 19), the Hearing Examiner finds that Technical Staff's neighborhood definition is appropriate in this case.

The neighborhood is composed of "predominantly single-family residential [properties] with very large estate type lots and parcels, unimproved parcels, and parkland, all in the RDT zone. The subject property abuts residential properties to the north, south and east, and parkland to the west (rear)." Exhibit 19, p. 4. Petitioners' counsel notes that the homes "are separated by great distances." Tr. 76. This fact is apparent both from the photos of the site shown on pages 5 through 7 of this report, and from the measurements specified on the revised site plan (Exhibit 18(k)), depicted in the next section of this report. The closest home to the storage/garage building being constructed by Petitioners (other than Petitioners' own home) is 474.2 feet away, and it will be separated from the landscape contractor area not only by distance, but also by a six-foot privacy fence and a double layer of Leyland Cypress trees. Exhibit 28(c).

B. Proposed Use

The Petitioners seek a special exception to legitimize a landscape contracting operation which has been established on the subject site for about three years. Although Petitioners originally sought permission to expand this operation as part of the special exception, they have reduced their request to

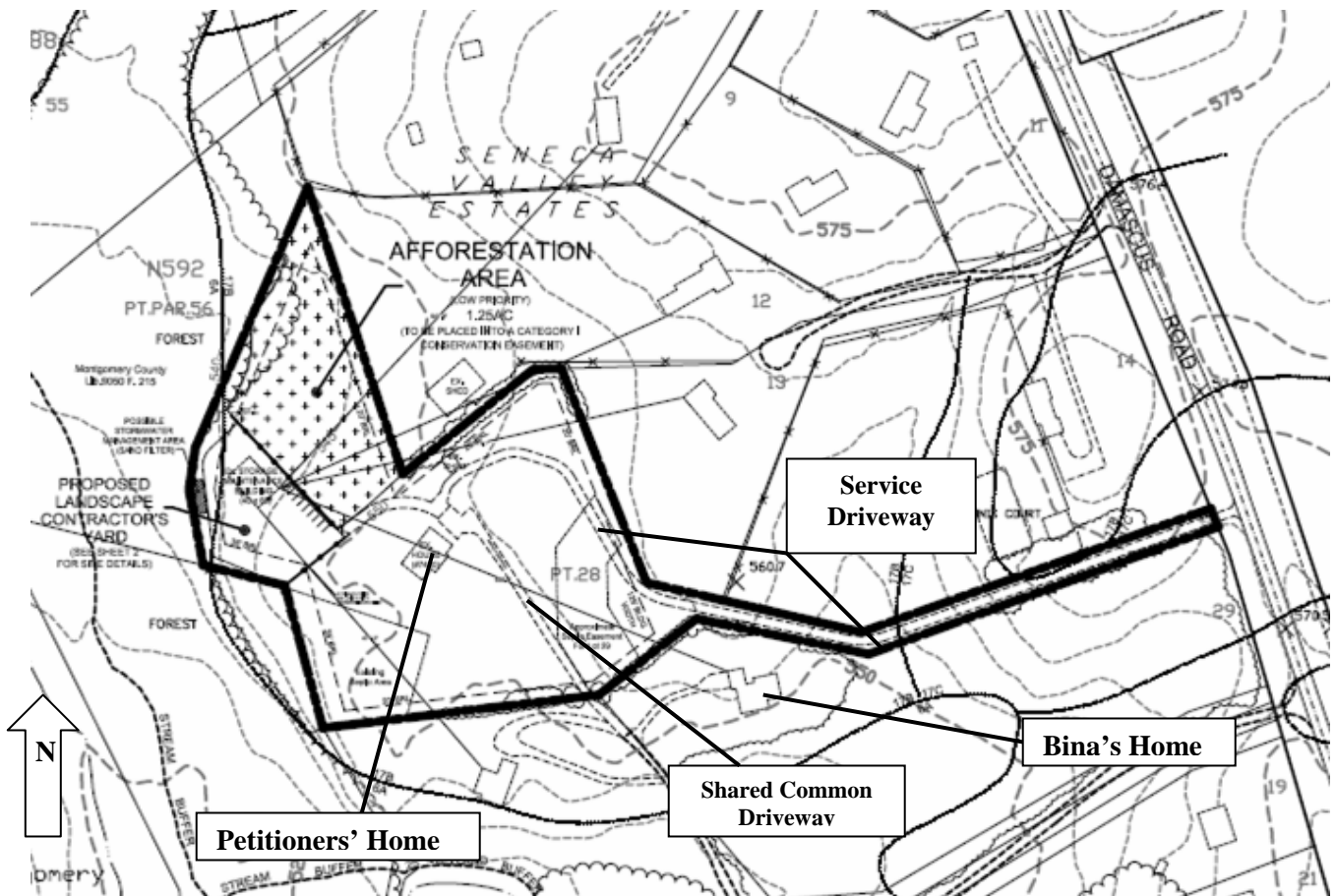
include only the number of employees, vehicles and equipment they are currently using, because of objections raised by their neighbor to the south and by Technical Staff. Thus, the proposed operation would include:

- 1) Hours of operation limited to the hours of 7 a.m. to 6 p.m., Monday through Friday (no weekend hours);
- 2) Ten non-resident employees, plus the two resident Petitioners;
- 3) Six trucks, including two dump trucks and an assortment of one half-ton, one-ton and two-ton work trucks. There may also be up to twelve mowers, four lawn and garden tractors, tractors, blowers, spreaders, aerators, shovels, hoses, various landscaping tools, and four snow plows;
- 4) A 40 foot by 60 foot steel building (14 feet in height) to be used to store all the equipment, and some trucks and trailers;
- 5) Two 250 watt light fixtures on the new steel building;
- 6) A six-foot privacy fence extending 105 feet on the southern side of the storage area and 213 feet on the northeastern side of the storage area, the other sides being surrounded by mature trees;
- 7) Additional Leyland Cypress trees screening the property, and bushes separating the residential and service driveways, all planted in accordance with a revised Landscape and Lighting Plan (Exhibit 28(c));
- 8) Eight parking spaces along the six-foot fence, used for employee and truck parking during the day and overnight;
- 9) Plants, mulch and topsoil to be stored on site in bags behind the six-foot fence;
- 10) A Final Forest Conservation Plan (FCP), with a 1.25-acre onsite afforestation area in a Category I Conservation Easement, that meets the requirements of Section 109(B) of the Forest Conservation Regulations, and is approved by the Planning Board;
- 11) Bathroom facilities located in the residential home that are freely available to the employees of the business;
- 12) A improved service driveway, in accordance with a commercial access permit from the State Highway Administration, with access onto MD 108 widened to a 25-foot width for a distance of 30 feet from MD 108, and any other improvements in the driveway required by SHA's permit specifications. Vehicles servicing the landscaping operation may use only the service

driveway;

- 13) No identification sign placed on the property, and visitors to the site in connection with the proposed use will be limited to the employees of the landscape contractor business. All business arrangements, including consultation and sales meetings that require the physical presence of customers, will be conducted off-site; and
- 14) No wholesale or retail horticultural nursery, or mulch/compost manufacturing operation conducted on the property. Plants, mulch and topsoil are to be stored on site in bags behind the six-foot privacy fence. There should be no storage of chemicals, pesticides, manure or debris on site.

The only change proposed by Petitioners is the construction of a 40 by 60 foot steel building, as described in Item #4, above. Other changes, such as additional landscaping and improving the service driveway, as described above, are recommendations of Technical Staff to avoid adverse effects on the neighbors and to comply with SHA requirements. Shown below is the revised Site Plan for the proposed operation (Exhibit 18(k)). The Development Standards Table and General Notes from the Site Plan are shown on the following page.



REQUIRED / PROVIDED DEVELOPMENT STANDARDS			
RDT ZONE (SECTION 59-C-9.4)			
	REQUIRED	PROVIDED	
MINIMUM LOT SIZE PERMITTED	40,000 SF	272,250 SF	
MINIMUM LOT WIDTH AT BUILDING LINE	125'	362'	
MINIMUM STREET FRONTAGE	25'	25'	
MAXIMUM LOT COVERAGE	10%	1.80%	
MAXIMUM BUILDING HEIGHT	50'	14-29'	
FOR MAIN BUILDING			
SETBACK FROM FRONT LOT LINE	50'	N/A	
SETBACK FROM SIDE LOT LINES	20'	80'+	
SETBACK FROM REAR LOT LINE	35'	128'+	
FOR ACCESSORY BUILDINGS			
SETBACK FROM FRONT LOT LINE	50'	N/A	
SETBACK FROM SIDE LOT LINES	15'	168'+	
SETBACK FROM REAR LOT LINE	10'	50'+	
LANDSCAPE CONTRACTOR (SECTION 59-G-2.30.00)			
MINIMUM LOT SIZE PERMITTED	2.0 AC	6.25 AC	
SETBACK FROM ALL LOT LINES FOR PARKING, LOADING AND ON-SITE OPERATIONS	50'	85'+	

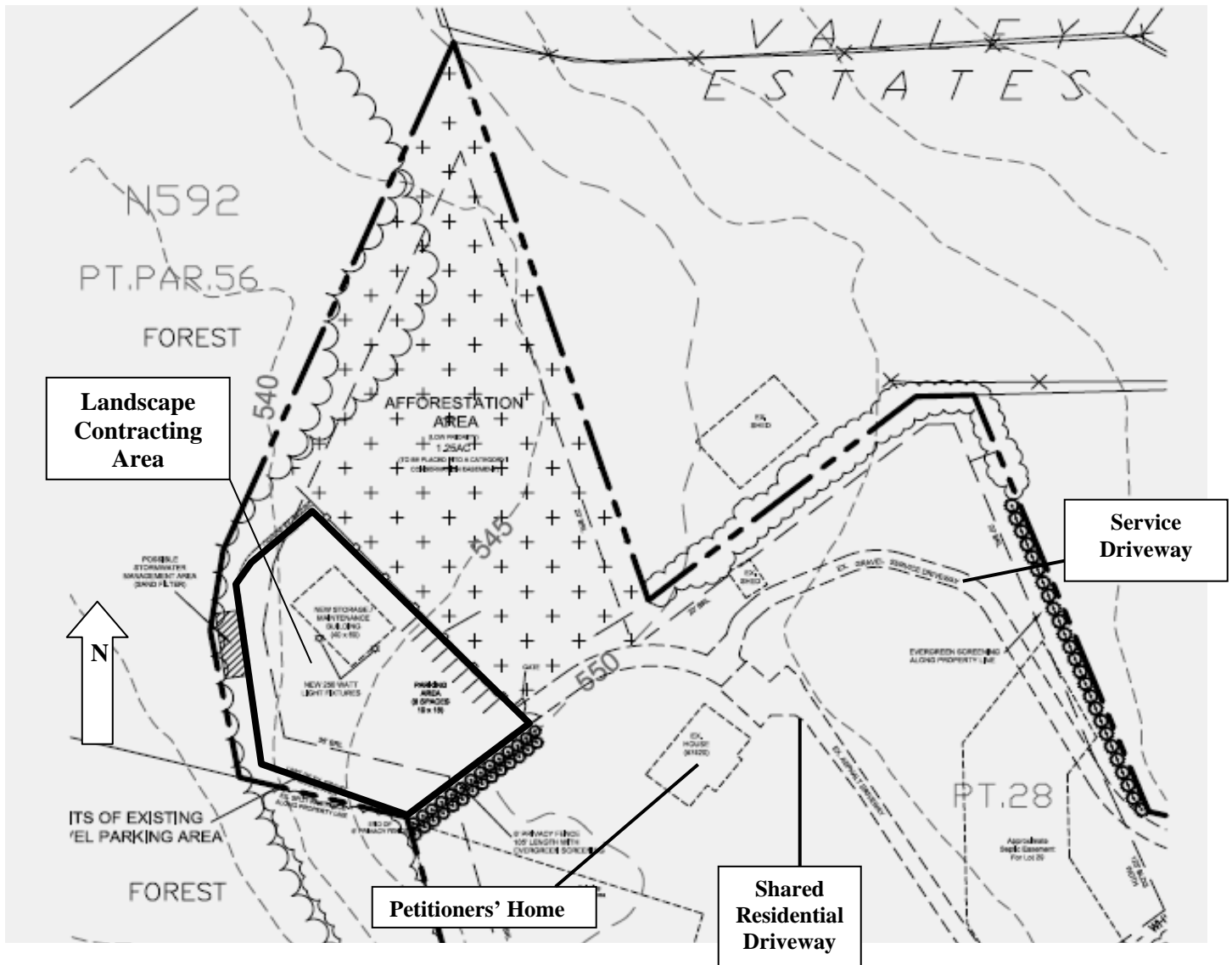
GENERAL NOTES:

- 1, CURRENT ZONING OF SUBJECT PROPERTY - RDT
- 2, PROPOSED USE - LANDSCAPE CONTRACTOR (permitted by Sec,-G-2,30,00)
- 3, AREA OF SUBJECT PROPERTY - 6,25 AC
- 4, EXISTING SEWER & WATER SERVICE CATEGORIES; S-6, W-6
- 5, PROPERTY IS SERVED BY INDIVIDUAL WELL AND ON-SITE SEWAGE DISPOSAL SYSTEM,
- 6, SITE IS LOCATED IN GREAT SENECA CREEK WATERSHED,
- 7, NO. OF PARKING SPACES PROVIDED - 8 PLUS 2 INSIDE BUILDING,
- 8, PARKING SPACES ARE FOR NIGHTTIME TRUCK PARKING AND DAYTIME EMPLOYEE USE,

The second amended statement of operations (Exhibit 21) describes the manner in which Petitioners intend to operate. Tr. 58. The trucks can all fit into the metal storage and garage building. When Petitioners go to a job site and remove debris, they take it to the County for disposal, never back to the subject property. They do not compost any material on site, nor store any debris or trash on the site. Petitioners' employees arrive at about 7:00 a.m. It takes them about 30 minutes to load their trucks

and leave for the work site. They come back at about 6:00 p.m., leave the trucks and depart in their cars. There will be no weekend work, and the only people visiting the site will be the 10 employees, who will be permitted to use the bathroom in Petitioners' home. The employees will use only the service driveway so as not to disturb the neighbors. Tr. 63-66.

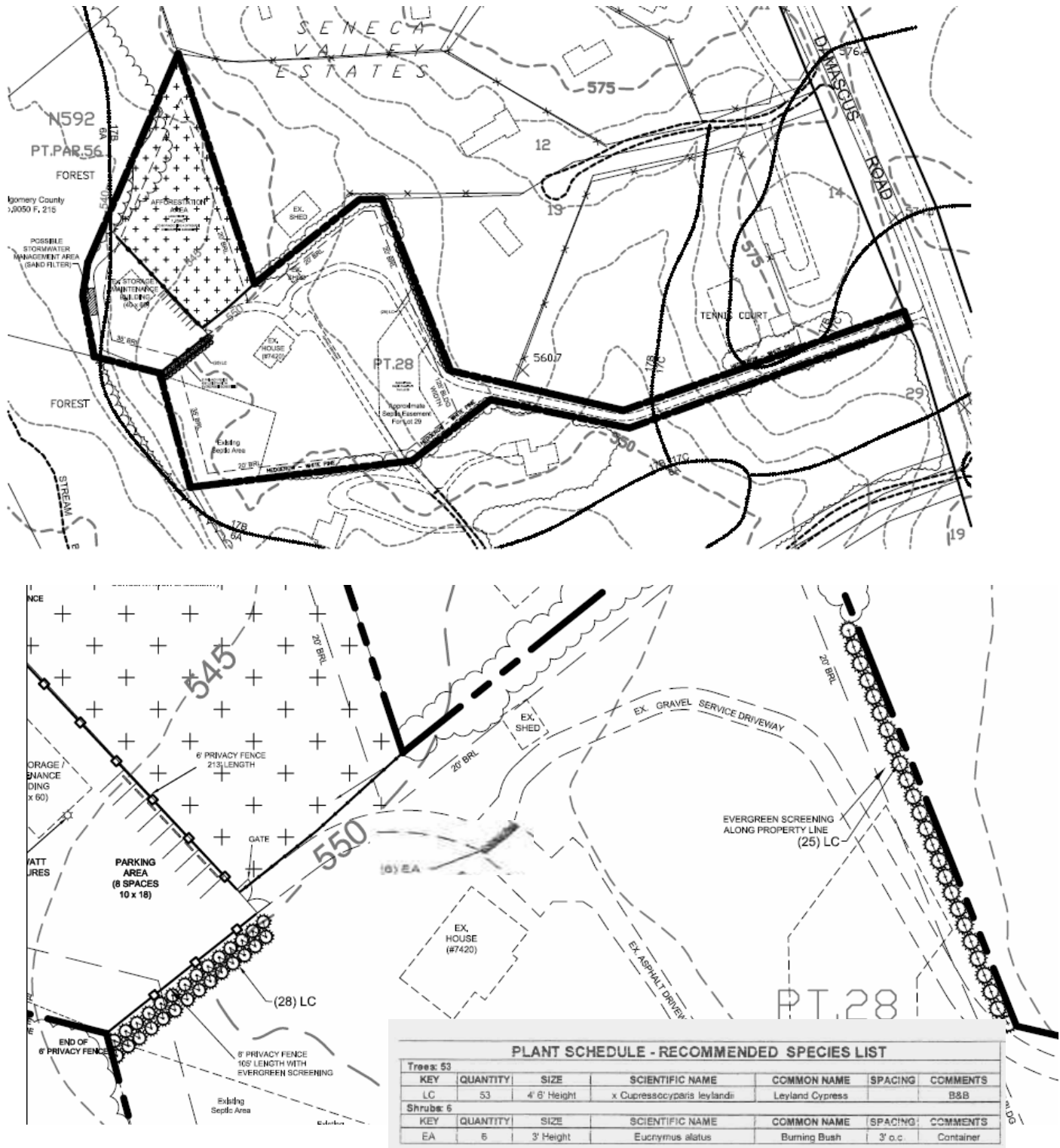
The detailed site plan (Exhibit 18(1)) is shown below:



The only gravel area on site will be the service driveway and the Landscape Contracting Area in the southwest corner of the site, as denoted above on the detailed site plan. The smaller existing shed on site is used for Petitioners' personal items, not in connection with the business. All of the on-site

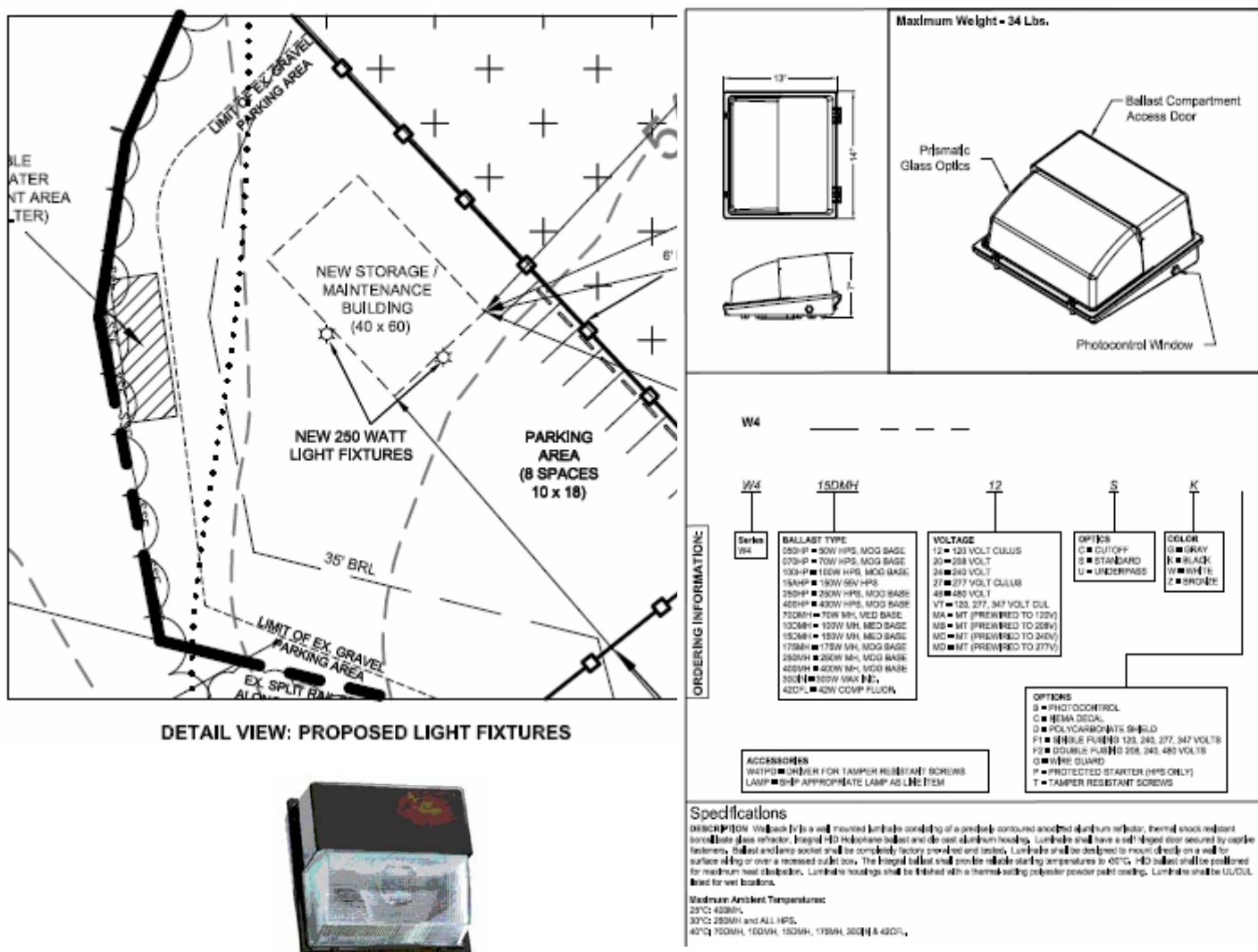
business will be conducted behind the six-foot privacy fence on the .73 acre portion of the property devoted to the landscaping contractor yard. Even though only that small portion of Petitioners' property will actually be used in the business, Petitioners have agreed to forest an area that is 20 percent of the entire 6.27 acre site (*i.e.*, 1.25 acres), which will improve the environment.

The final Landscaping and Lighting Plan and "Detail View" (Exhibit 28(c)), are shown below:



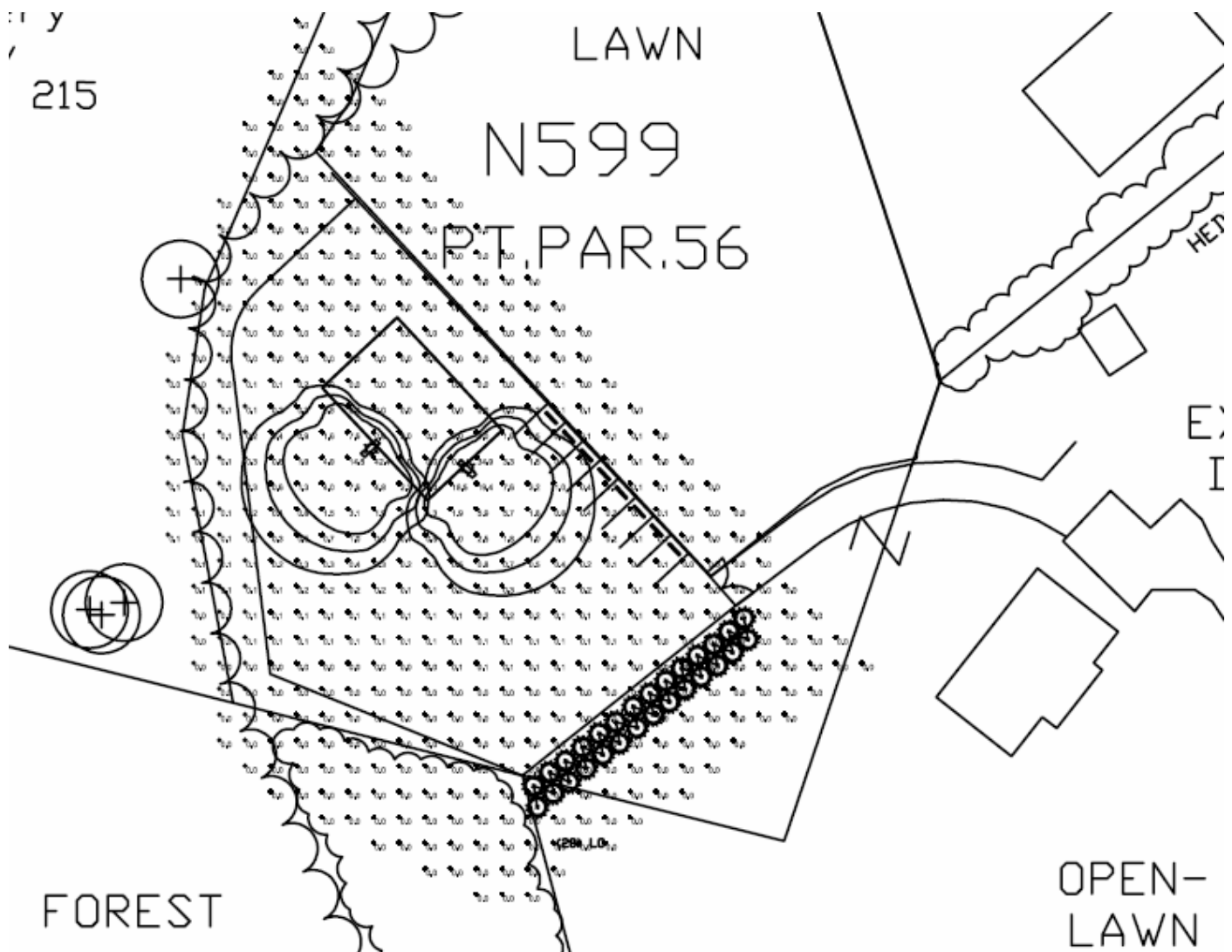
As can be seen on the Detail View, above, there is a double row of Leyland Cypress shielding any view of the landscape contractor yard from the south,⁴ a single row of Leyland Cypress on Eastern property line shielding the view of the landscape contractor yard from properties to the east and from Damascus Road, and a row of six bushes separating the common residential driveway from the service driveway.

Proposed lighting (two 250 watt lights to be installed on the new building) is shown below, in a portion of Exhibit 18(g).



⁴ Community Based Planning Division indicated that it did not support “evergreen landscaping along the western lot line” (Exhibit 19, p. 5), but the Hearing Examiner notes that the Leyland Cypress in question are not on the western lot line. Moreover, Technical Staff and the Planning Board explicitly recommended, as a proposed Condition 13 (Exhibits 19 and 25, p. 3) that the landscaping be in accordance with the Landscape and Lighting Plans submitted on May 9, 2007 (Exhibit 18(f)), which contained the same evergreen screening as depicted in the current Landscape and Lighting Plan, Exhibit 28(c). The Hearing Examiner therefore concludes that Exhibit 28(c) is consistent with their recommendations.

As demonstrated in the following the photometric study, also from Exhibit 18(g), there will be no light spillage onto other properties, as lighting levels at the rear and side property lines will be less than 0.1 footcandles, the standard for a residential zone.



C. The Environment

According to Technical Staff, this site is not located within a Special Protection Area, and there are no streams, wetlands or other sensitive environmental features on the property. Exhibit 19, p. 7. Petitioners' Natural Resources Inventory/Forest Stand Delineation, No. 4-06334 (NRI/FSD) was approved on June 28, 2006 (Exhibit 6(b)). Environmental Planning staff reviewed the Preliminary

Forest Conservation Plan (FCP) submitted for the project (Exhibits 18 (h), (i) and (j)) and determined that, by planting 1.25 acres of forest on site adjacent to the Great Seneca Stream Valley Park, as proposed, the project will meet the requirements of Forest Conservation Law. Exhibit 19, p. 7. The Planning Board approved Preliminary FCP, subject to conditions which have been included as recommendations in this report, with minor language modifications.⁵

Environmental Planning staff reported that the Department of Permitting Services approved the applicants' stormwater management concept request by letter dated February 8, 2007, and opined that the proposed project should not adversely affect water quality. The stormwater management concept consists of on-site channel protection measures via the use of a dry pond. On-site water quality control and onsite recharge will be provided via the use of a surface sand filter and non-structural measures. Exhibit 19, pp. 7-8.

D. The Master Plan

The property in question is located in the area covered by the *Damascus Master Plan*, approved and adopted in 2006. The subject site is located in a rural area, and the Master Plan expressly reconfirms the RDT zoning for this area. Master Plan, p. 32 (Planning Board Draft of 2005, Exhibit 7(b)). As pointed out by Technical Staff (Exhibit 19, pp. 4-6), the Plan recommends the following with respect to special exceptions in rural areas (page 32):

- Retain the existing boundaries of the RDT Zone, except as noted, and support agriculture and agriculturally related business.
- Endorse and support criteria for evaluation of agriculturally related special exceptions.
- When evaluating compatibility with surrounding land uses the impact of agricultural related special exceptions in agricultural zones do not necessarily need to be controlled as stringently as the impact of similar special exceptions in a residential zone.

* * *

⁵ Martin Klauber, the People's Counsel, suggested modifying some of the conditions recommended by Technical Staff and the Planning Board. Specifically, Mr. Klauber correctly noted that it is the Planning Board, not Technical Staff, that must ultimately approve Forest Conservation Plans. Tr. 6-9.

- Establish Special Exception Guidelines for rural vista protection in the Rural Areas of Damascus.

In connection with the last bullet point, when the Council approved the Master Plan on May 25, 2006 (Resolution No. 15-1485), it added the following language to page 94 of the Master Plan:

When special exceptions are proposed in the transition and rural areas within the Damascus Master Plan, their review should take into special consideration the preservation of these long vistas that are part of the unique character of the community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose.

According to the submitted site plan, the proposed use will be located at the rear of the property at an elevation lower than the surrounding residential uses and adjacent to heavily forested areas of the Great Seneca Stream Valley Park. This lower elevation should help to preserve the long vistas, as recommended by the Master Plan. The photos displayed on pages 5 through 7 of this report show that the long vistas have indeed been maintained.

As observed by Technical Staff, the proposed use is an agriculturally related use, and as such is appropriate in the RDT zone. “The Master Plan supports agriculturally related uses as a means to support the existing agricultural economy and to continue the protection of the Agricultural Reserve. The requested special exception is consistent with the policies and recommendations contained in the Damascus Master Plan.” Exhibit 19, pp. 5-6. The Hearing Examiner agrees with this analysis, and finds that the proposed use is consistent with the *2006 Damascus Master Plan*.

E. Transportation Facilities

Technical Staff reports that the proposal meets the requirements of Local Area Transportation Review (LATR). Exhibit 19, pp. 6-7. According to Transportation Planning Staff, the site would generate 19 peak-hour vehicle trips during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak periods. Because this figure is under 30, no traffic study is required to satisfy the Local Area Transportation Review test.

Damascus Road (MD 108) is a two-lane major highway, with a 120-foot wide right-of-way. Currently, the service driveway has a 20-foot wide access from Damascus Road. Transportation staff indicates that the State Highway Administration (SHA) found the existing service driveway to be “substandard in width, turning radii and condition” for use by the trailers and longer wheel base vehicles expected to service this site. Therefore, a condition has been recommended requiring that Petitioners improve the service driveway, in accordance with a commercial access permit from the State Highway Administration, with access onto MD 108 widened to a 25-foot width for a distance of 30 feet from MD 108, and any other improvements in the driveway required by SHA’s permit specifications.

Transportation Staff concluded that the improved access will be safe and adequate; that the number of parking spaces will be adequate; and that approval of the subject special exception petition will not adversely affect the surrounding roadway system. In the absence of any evidence to the contrary, the Hearing Examiner so finds.

F. Community Concerns

The Office of the People’s Counsel recommended approval of the petition, subject to appropriate conditions. Tr. 6-9. The only opposition expressed in this case came in the form of letters from a neighbor to the south, Saiid Bina (Exhibits 14 and 24). Mr. Bina argues that granting the special exception will “change our residential neighborhood from residential to commercial.” Exhibit 24. He expressed concern about storage of “mulch, manure, pesticides, chemicals [and] fertilizers, [and] commercial traffic of heavy duty trucks and landscaping machinery . . .” Exhibit 14. Mr. Bina also expressed a fear that the business would expand if the special exception were granted.

While Mr. Bina has some legitimate concerns, they can all be alleviated by appropriate conditions. Petitioners will not be permitted to store manure, pesticides and chemicals on site. Even the mulch and topsoil permitted on site will be in bags, stored where they will not be seen. Mr. Bina’s house is located approximately 669 feet from the new storage building, as shown on the revised site

plan, Exhibit 18(k). (The closest neighboring home is 474 feet from the new storage/garage building.) There will be two rows of Leyland cypress to the south of the landscape contracting yard to shield any view that Mr. Bina would have of the subject property. These Leyland cypress trees are in addition to a six-foot tall, solid wood fence which surrounds two sides of the landscape contracting yard. The other two sides are abutting a County park, which has a thick forest.

The photos reproduced on pages 5 through 7 of this report demonstrate that the landscaping operation will be far from the neighbors and that the open rural vistas will be maintained. Landscaper vehicles will be restricted to the service driveway, and will be very limited both as to numbers and time of operation on site. No signs will be posted identifying the business, and customers will not be permitted on site. Noisy operations such as manufacturing of mulch will not be allowed on the property. Contrary to Mr. Bina's fears, no increase in Petitioners' business activities will be permitted as part of this special exception.

Finally, Mr. Bina is not correct in his suggestion that granting the special exception will convert a residential neighborhood into a commercial one. The site is not residentially zoned now. It is in the RDT Zone, which is an agricultural zone. Landscape contractor special exceptions are permitted in the RDT Zone, and the *Damascus Master Plan* expressly recommends support of agriculturally related businesses. The Master Plan also specifies (page 32),

When evaluating compatibility with surrounding land uses the impact of agricultural related special exceptions in agricultural zones do not necessarily need to be controlled as stringently as the impact of similar special exceptions in a residential zone

The Hearing Examiner finds that Petitioners' landscape contractor business is compatible with the agricultural zone in which it is located, and it will be conditioned so as to avoid any adverse impacts on the residential neighbors.

III. SUMMARY OF THE HEARING

The only witness called at the hearing was Petitioner Fabricio Fidelis. No opposition appeared. The People's Counsel, Martin Klauber, participated briefly, but did not call any witnesses.

A. Petitioners' Case

1. Statement by Petitioners' counsel, David C. Gardner, Esquire (Tr. 9 – 33; 71-77):

Petitioners' counsel, David C. Gardner, Esquire, stated that he agreed with the observations of Martin Klauber, the People's Counsel, that it is the Planning Board, not Technical Staff, that must ultimately approve Forest Conservation Plans, and it is the Board of Appeals, not Technical Staff, that sets the final terms of the Landscape Plan which must be followed. Tr. 9-11. Mr. Gardner indicated that Petitioners have been running the landscape contractors business for about three years. They were given a violation notice by DPS on April 11, 2005 (Exhibit 26).

Petitioners propose to continue operating as they have previously, with the only change being the construction of a 40 by 60 foot steel building. Currently, Petitioners have 10 employees. They use six trucks and four trailers. That is what Petitioners propose for the special exception. The trucks are medium in size. They will not be producing mulch on the site. The trailers are generally used for carrying landscaping equipment and removing debris from a work site. The requested landscaping equipment is the same as Petitioners have been using.

According to Mr. Gardner, Petitioners' employees come in the morning and get in the trucks, usually two or three men in a truck. The trucks are sent in the morning out to a job site. Most of the business, 95 percent, is at residences, all of which have been in Montgomery County.

Petitioners' home uses a common driveway which travels through his neighbor's property to the south, makes a bend, and comes out to Damascus Road, which is a State highway. The only opposition has been from that neighbor to the south, Mr. Bina. Mr. Gardner believes the neighbor didn't like the fact that originally Mr. Fidelis' vehicles for the business were coming out his driveway and passing

along a common driveway used by his neighbor's home. So, approximately a year ago, Petitioners got a permit for and constructed a separate service driveway which is entirely on his property, and it travels out a dogleg to Damascus Road, to the north of the common residential driveway. All of the business trucks and vehicles will utilize the service driveway. At no time will they utilize the common driveway. Petitioners have agreed to have a three foot separation between the driveways.

Mr. Bina, the neighbor in opposition, has a house located approximately 669 feet from the new storage building, and between the two driveways, as shown on the revised site plan, Exhibit 18(k). The closest neighboring home is 474 feet from the new storage building. There will be two rows of Leyland cypress to the south of the landscape contracting yard to shield any view that Mr. Bina would have of the subject property. These Leyland cypress trees are in addition to a six-foot tall, solid wood fence which surrounds on two sides the landscape contracting yard. The other two sides are abutting a County park, which has a very thick forest.

There is going to be a 1.25 acre forest, which Petitioners have agreed to place in a Category One Conservation Easement, and they will put a split rail fence around it, which Park and Planning has recommended.

Mr. Gardner feels that Petitioners have taken every active measure possible to mitigate any visual impact that the business will have. Petitioners have also taken every measure possible to mitigate any noise by building a private service driveway which will not have any more vehicles traverse it than currently use the property. Petitioners have also agreed not to put a sign out on the highway, and not to have anyone come to the site that doesn't work there. All of Petitioners' sales and transactions occur off-site.

They also will not be storing anything except bags of plant materials on the site, and they are not actively growing plants. This will not be a landscape nursery, and they are not going to do any composting or grinding of any materials on the site. They are also not going to store any waste on the

site. Any waste will go on stake-bodied trucks to the transfer station, and the stake-bodied trucks come back to the site empty.

The smaller existing shed on site is used for Petitioners' personal items, not in connection with the business. All of the on-site business will be conducted behind the six-foot privacy fence on the .73 acre portion of his property devoted to the landscaping contractor yard. Even though only that small portion of Petitioners' property will actually be used in the business, Petitioners have agreed to forest an area that is 20 percent of the entire 6.27 acre site (*i.e.*, 1.25 acres), which will improve the environment.

None of the other neighbors have special exceptions, and none of the neighbors but Mr. Bina has objected. Two 250 watt lights will be installed on the new building, but the photometric study (Exhibit 18(g)) shows that there will be no light spillage onto other properties.

Mr. Gardner also discussed an unusual condition relating to the site. The property is composed of two parts, Part of Lot 28 and Part of Parcel 56. The original Lot 28 contained 10.01 acres. Tr. 29. In 1986, 6.03 acres of the original Lot 28 was taken by the government as parkland. That portion was called Parcel 56. The government later decided, however, that it did not need all of the 6.03 acres dedicated for parkland, so it kept under 4 acres of Parcel 56 and gave back Part of Parcel 56 (about 2.27 acres). The remainder of Parcel 56, plus the remainder of the original Lot 28, now constitute the 6.27 acre subject site. Petitioners' metal storage and garage building is being constructed on Part of Parcel 56, which is an unrecorded lot. Despite this fact, the Department of Permitting Services (DPS) issued a permit for that construction, and Petitioners therefore do not intend to seek subdivision unless required to do so. Tr. 29-32. Petitioners have received all the necessary permits for the buildings and fences constructed on the site, or under construction.

Mr. Gardner discussed compliance with each of the general and special conditions for this special exception.

2. Fabricio Fidelis (Tr. 34 – 71; 77- 85):

Fabricio Fidelis testified that he and his wife live on the subject site in a three bedroom, colonial style house. Mr. Fidelis identified the various photos in Exhibits 8(a) through (f) and the accompanying photo maps (Exhibits 10(a) through (d)). He noted that Mr. Bina lives behind the pine trees shown in the background of Photo 9 on Exhibit 8(a), so Mr. Bina doesn't have any view of Petitioners' house, and the landscapers lot will be behind the house.

Mr. Fidelis further testified that he is not aware of any other special exceptions in the neighborhood, and an existing shed on a neighbor's property to the northeast of him is larger than the metal storage and garage building he is building on the subject site. Mr. Fidelis has a small shed on his own property that he uses to store personal items. Mr. Fidelis will plant bushes where the two driveways intersect, near his home, to keep each separated by three feet. A new landscaping plan will be submitted to show those bushes. He also described the 28 Leyland cypress he will be planting to screen the landscape contractor's yard and the 25 Leyland cypress he will plant near the eastern property line to screen the service driveway. The only gravel area on site will be the service driveway and the area enclosed in a dashed line on the detailed site plan in the southwest corner of the site.

Mr. Fidelis is currently constructing a new 40 by 60 foot storage and maintenance building with the two lights, as depicted. There will be eight parking spaces alongside the fence which will be marked by concrete berm stops. The State Highway Administration has sent a letter saying that the existing gravel service driveway has to be constructed to commercial standards, and they want it to be 25 feet wide at the entrance instead of the current 20 feet.

There are no other changes planned. The second amended statement of operations describes the manner in which Petitioners intend to operate. Mr. Fidelis described the trucks, trailers and equipment he has on site. The trucks can all fit into the metal storage and garage building. He testified that when he goes to a job site and removes debris, he takes it to the County for disposal,

never back to the subject property. He does not compost any material on site or store any debris or trash on the site. He will store only bags of mulch and topsoil, and some plants for a day or two while waiting to take them to a job site.

Petitioners' employees arrive at about 7:00 a.m. It takes them about 30 minutes to load their trucks and leave for the work site. They come back at about 6:00 p.m., leave the trucks and depart in their cars. There will be no weekend work, and the only people visiting the site will be the 10 employees. The employees will use only the service driveway. Employees will be permitted to use the bathroom in Petitioners' home.

Mr. Fidelis agreed to meet the conditions recommended by Technical Staff and the Planning Board, as modified by Mr. Klauber's comments. Tr. 67-69. Mr. Fidelis adopted the findings, analysis and conclusions in the Technical Staff report as his own testimony (Tr. 70-71).

According to Mr. Fidelis, the area to be afforested is currently mostly grass, except for the northwestern section, which is already forest. Mr. Fidelis testified that he would not create any objectionable noise, vibrations, fumes, odors, dust, illumination, or physical activity that would have an adverse impact on the neighbors. He will merely be continuing the current existing business, which will not have any detrimental impact on the use, peaceful enjoyment, economic value, or development of surrounding properties. The existing residential use is served by adequate well and septic facilities. There is also adequate police and fire protection.

Mr. Fidelis had not received any complaints from the neighbors during the three years he has been operating his business until Mr. Bina wrote in connection with this case. Damascus Road has light traffic, and he has never had any trouble getting in and out on the road, even in rush hour. His trucks do not go in and out except for once in the morning and once in the evening.

Mr. Fidelis agreed that if subdivision is required to return Part of Parcel 56 to Lot 28, he will file the subdivision application. Tr. 82.

B. People's Counsel

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate in part of it, suggesting modification of some of the conditions recommended by Technical Staff and the Planning Board. Specifically, Mr. Klauber correctly noted that it is the Planning Board, not Technical Staff, that must ultimately approve Forest Conservation Plans, and it is the Board of Appeals, not Technical Staff, that sets the final terms of the Landscape Plan which must be followed. Petitioners agreed to these changes in the conditions that had been proposed by Technical Staff and the Planning Board. Mr. Klauber recommended approval of the requested special exception, subject to the appropriate conditions (Tr. 6- 9).

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the proposed use will successfully avoid significant adverse effects on the community and will meet the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Inherent and Non-Inherent Adverse Effects

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational

characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a landscape contractor use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff describes the inherent characteristics of a landscape contractor as including “noise associated with staff arrivals and departures from the site, loading of equipment, and operation and maintenance of the various equipment used in the business (*i.e.*, lawn mowers, garden tractors, etc.).” Exhibit 19, p. 12. The Hearing Examiner’s description of the inherent characteristics of a landscape contractor is broader than just operational noise. Rather, it includes buildings, structures and outdoor areas for the storage of plants and gardening-related equipment; outdoor storage of mulch, soil and other landscaping materials, in bulk or in containers; on-site storage of business vehicles and equipment including small trucks and landscaping trailers; traffic associated with trips to

the site by employees, suppliers and customers; trips to and from the site by employees engaged in off-site landscaping activities; adequate parking areas to accommodate customers and staff; dust and noise associated with the movement of landscaping products and the loading and unloading of landscaping equipment; and long hours of operation.

As is apparent from this record, the proposed operation is small in scale and does not have many of the characteristics of landscape contractors that might produce adverse effects on neighbors. There will be little traffic produced; there will be no customers on site; there will be little noise since mulch will not be manufactured on site; few materials will be stored on site; and the hours will not be overly long. Most of this business is effectively conducted off site.

Technical Staff states that “the proposed use with the recommended conditions is not likely to result in adverse operational characteristics such as noise or excess traffic to the site, [and concludes that] . . . [t]here are no inherent or non-inherent adverse impacts associated with this application sufficient to warrant a denial of the subject special exception.” Exhibit 19, pp. 12-13. The Hearing examiner finds that the proposed use, as conditioned, will create no non-inherent effects. All of its physical and operational characteristics are likely be found in a typical landscape contractor operation, and most frequently to a greater degree.

In sum, the record in this case provides no basis for denial of the petition.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners’ written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions:

- (a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

- (1) *Is a permissible special exception in the zone.*

Conclusion: A landscape contractor is permitted by special exception in the RDT Zone.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use would comply with the standards and requirements set forth for the use in Code §59-G-2.30.00, as detailed in Part IV. C., below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The property in question is located in the area covered by the *Damascus Master Plan*, approved and adopted in 2006. The subject site is located in a rural area, and the Master Plan expressly reconfirms the RDT zoning for this area. Master Plan, p. 32 (Planning Board Draft of 2005, Exhibit 7(b)). The Plan also recommends support for agriculturally related business. As observed by Technical Staff, the proposed use is an agriculturally related use, and as such is appropriate in the RDT zone. “The Master Plan supports agriculturally related uses as a means to support the existing agricultural economy and to continue the protection of the Agricultural Reserve. The requested

special exception is consistent with the policies and recommendations contained in the Damascus Master Plan.” Exhibit 19, pp. 5-6. For all the reasons set forth in Part II. D. of this report, the Hearing Examiner agrees with this analysis, and finds that the proposed use is consistent with the *2006 Damascus Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed use would be in harmony with the general character of the neighborhood, for the reasons well summarized by Technical Staff (Exhibit 19, pp. 15-16): “The site and landscape plans provide for extensive landscaping, adequate setbacks, substantial green space and sufficient building setbacks. There is extensive buffering, in the form of landscaping, afforestation, fencing and existing wooded areas, between the nearest residential properties and the proposed use. Due to the nature of the use, the hours of operation, and the location of the property within the neighborhood, it is unlikely that the proposed use will generate a level of traffic or noise that will adversely affect the residential neighborhood.”

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons stated in response to the previous section, the proposed use will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There will be equipment, trucks and activities related to the business; however, because of the small scale of the operation, its limited nature (*i.e.*, no mulching or composting, no customers on site, and only six trucks and four trailers), and the setbacks and screening on the subject site, Hearing Examiner finds that the proposed use would cause no noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity which could be characterized as objectionable in this agricultural zone. The photometric study (Exhibit 18(g)), demonstrates that there will be no light spillage onto other properties.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: There are no other special exceptions in the area (Exhibit 19, p. 17), and thus the evidence supports the conclusion that the proposed special exception would not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely. Moreover, although there are nearby residences, this site is located in an agricultural zone, not a residential zone, and the proposed special exception use is consistent with the recommendations of the Master Plan.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers

in the area at the subject site.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

(i) *If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review[LATR] and the Policy Area Transportation Review[PATR]⁶, as required in the applicable Annual Growth Policy.*

(ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. The proposed use should not adversely impact transportation or stormwater management, as discussed in Parts II. C. and E. of this report, and by its nature, it has no impact on schools. Because of the small amount of traffic it will produce, LATR is satisfied without a traffic study. Technical Staff also reports that that the improved service access will be safe and adequate; that the number of parking spaces will be adequate; and that approval of the subject special exception petition will not adversely affect the surrounding roadway system. For the reasons outlined in Part II.A. of this report, at pages 8 through 10, the Hearing Examiner recommends a condition requiring some form of subdivision for this site because the storage/garage structure is

being constructed on Part of Parcel 56, which is not a recorded lot.

C. Specific Standards: Landscape Contractor

The specific standards for a landscape contractor are found in Code § 59-G-2.30.00. The Technical Staff report and the Petitioners' written evidence and testimony provide sufficient evidence that the proposed landscape contractor use would be consistent with the specific standards, as outlined below.

Sec. 59-G-2.30.00 Landscape Contractor.

This use may be allowed together with incidental buildings upon a finding by the Board of Appeals that the use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors. It is not uncommon for this use to be proposed in combination with a wholesale or retail horticultural nursery, or a mulch/compost manufacturing operation. If a combination of these uses is proposed, the Board opinion must specify which combination of uses is approved for the specified location.

Conclusion: The landscape contractor use is not proposed in combination with a retail horticultural nursery or a mulch/compost manufacturing operation. As is documented elsewhere in this report, this use will not constitute a nuisance because of traffic, noise, hours of operation, number of employees, or other factors, mainly because it is small in scale, will be operating in an agricultural area and will be well-buffered from its neighbors by setbacks and landscaping.

(1) The minimum area of the lot must be 2 acres if there are any on-site operations, including the parking or loading of trucks or equipment.

Conclusion: The subject site is approximately 6.25 acres, well above the 2 acre minimum.

(2) Areas for parking and loading of trucks and equipment as well as other on site operations must be located a minimum of 50 feet from any

⁶ PATR does not apply since the subject petition was filed after July 1, 2004.

property line. Adequate screening and buffering to protect adjoining uses from noise, dust, odors, and other objectionable effects of operations must be provide for such areas.

Conclusion: Areas for parking and loading of trucks and equipment, as well as other on-site operations, are located a minimum of 50 feet from any property line. “Adequate buffering and screening is provided in the form of a landscape strip, substantial distance from residential buildings, existing mature trees and wooded areas, fencing, and a forest conservation easement.” Exhibit 19, p. 13. The evidence supports the conclusion that setbacks, topography, and landscaping are adequate to protect adjoining uses from noise, dust, odors and other objectionable effects of these operations, given that some amount of noise, dust and odor is inherent in the use.

(3) The number of motor vehicles and trailers for equipment and supplies operated in connection with the contracting business or parked on site must be limited by the Board so as to preclude an adverse impact on adjoining uses. Adequate parking must be provided on site for the total number of vehicles and trailers permitted.

Conclusion: Recommended Condition #8 specifies the vehicles which may be on the subject property – a maximum of six trucks and four trailers (*i.e.*, no expansion of the current operation). The six trucks includes two dump trucks and an assortment of one half-ton, one-ton and two-ton work trucks. Technical Staff and the Planning Board found that the number of vehicles proposed by Petitioners in their revised plan was not excessive and that adequate parking had been provided (8 parking spaces in the yard, and additional space in the storage/garage building). The Hearing Examiner so finds.

(4) No sale of plant materials or garden supplies or equipment is permitted unless the contracting business is operated in conjunction with a retail or wholesale nursery or greenhouse.

Conclusion: No retail activity will occur on the site.

(5) The Board may regulate hours of operation and other on-site operations so as to prevent adverse impact on adjoining uses.

Conclusion: The hours of operation for the subject landscaping contractor business are from 7:00 am to 6:00 p.m., Monday through Friday. Employees arrive in the morning to pick-up company vehicles, materials and equipment, and return in the evening to retrieve their private automobiles. The Hearing Examiner finds that these operating hours are not likely to have adverse impact on adjoining uses.

(6) In evaluating the compatibility of this special exception with surrounding land uses, the Board must consider that the impact of an agricultural special exception on surrounding land uses in the agricultural zones does not necessarily need to be controlled as stringently as the impact of a special exception in the residential zones.

Conclusion: The proposed use is located on a state highway, is substantially removed from off-site residential uses and will not increase existing traffic. The Hearing Examiner finds that the use is appropriate at this rural location in the Rural Density Transfer Zone.

D. General Development Standards

In addition to the other general and specific standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, RDT – Rural Density Transfer] except when the standard is specified in Section G-1.23 or in Section G-2.*” For this special exception, the applicable development standards specified in Section 59-G-2.30.00 include minimum lot area, minimum setbacks, adequate parking, adequate screening and certain frontage requirements. These requirements and Petitioners’ compliance with them have been discussed in Part IV.C, above. The RDT Zone also includes requirements for minimum lot width, maximum lot coverage and maximum building height. Under § 59-G-1.23(a), we must also consider consistency with the forest conservation and water

quality plans, signs that comply with Code § 59-F and appropriate lighting under Code § 59-G-1.23(h).

1. Development Standards Specified in the Special Exception and in the Zone:

The Table below from the Technical Staff report (Exhibit 19, pp. 9-10) sets forth the development standards spelled out for the Special Exception (Landscape Contractor), as well as those specified for the RDT Zone. As is evident, Petitioners meet all development standards.

Development Standard	Required	Proposed/Existing
Minimum Lot Area	40,000 SF	272, 250 SF
Minimum Lot width: <ul style="list-style-type: none"> ▪ at street line ▪ at building line 	25 ft 125	25 382
Minimum Building Setback: <ul style="list-style-type: none"> a. From street b. From Adjoining lot Side yard: <ul style="list-style-type: none"> ▪ One side ▪ Sum of both sides Rear yard 	50 ft 20 ft 40 ft 50 ft	50+ 155 ft 355 ft 310 ft
Yard Requirement-Accessory building <ul style="list-style-type: none"> a. Front lot line b. From side lot line <ul style="list-style-type: none"> ▪ Of Interior lot ▪ Of a lot abutting a public street c. Rear lot line 	50 ft 15 ft 50 ft 10 ft	50+ 170 ft NA 50
Maximum Building Height	50 ft	29 ft
Maximum Lot Coverage	10%	1.8%
Sec. 59-G-2.30.00 Landscape Contractor <ul style="list-style-type: none"> ▪ Minimum Lot Size ▪ Setback for parking and loading 	2.0 ac 50 ft	6.25 ac 50 ft

2. Development Standards Specified in Section 59-G-1.23

The remaining development standards in Code §59-G-1.23 which are applicable to this case concern forest conservation, water quality plans, signs and lighting.⁷

Forest Conservation and Water Quality Plans:

Sec. 59-G-1.23(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Sec. 59-G-1.23(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: These environmental issues were addressed in Part II C. of this report, and the Hearing Examiner finds that Petitioners are compliant.

Signs and Lighting

59-G-1.23(f) Signs. The display of a sign must comply with Article 59-F.

59-G-1.23(h) Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:

(1) Luminaires must incorporate a glare and spill light control

⁷ 59-G-1.23(g), concerning “Building compatibility in residential zones,” does not apply because the subject site is not in a residential zone.

device to minimize glare and light trespass.

(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.

Conclusion: There will be no signs placed on the subject property. As to lighting, Sections 59-G-1.23(h) may not apply in the instant case because the property in question is not in, or adjacent to, a residential zone. It is however, adjacent to residential property. Nevertheless, as shown in Part II.B. of this report (pp. 17-18), the evidence is clear that no obtrusive light from Petitioners' operation will reach outside the property line.

Based on the testimony and evidence of record, I conclude that, with the recommended conditions, the use proposed by Petitioners meets the specific and general requirements for a landscape contractor special exception, and that the Petition should be granted, with the conditions recommended in the final section of this report.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2695, which seeks a special exception to operate a landscape contractor business at 7420 Damascus Road, Gaithersburg, Maryland, be ***granted*** with the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, and by the testimony of their witnesses and representations of counsel identified in this report. All representations made by Petitioners' counsel at the hearing and in filings included in the record are hereby so identified.
2. Petitioners must submit a Final Forest Conservation Plan (FCP) that meets the requirements of Section 109(B) of the Forest Conservation Regulations. The Final FCP must be approved by the Planning Board prior to any further work on the project.
3. Petitioners must place the 1.25-acre onsite afforestation area in a Category 1 Conservation Easement. The easement must be protected by split-rail fencing or other measures approved

by the Planning Board.

4. Afforestation area must be planted during the first planting season after approval of the final Forest Conversation Plan.
5. The maximum number of employees, excluding the Petitioners, must be limited to 10.
6. Hours of operation for the landscape contractor business are limited to 7:00 a.m. through 6:00 p.m., Monday through Friday.
7. Use of bathroom facilities located in the residential home must be made freely available to the employees of the business.
8. The landscape contractor business must not have more than six trucks and four trailers (*i.e.*, no expansion of the current operation). The six trucks includes two dump trucks and an assortment of one half-ton, one-ton and two-ton work trucks. There may also be up to twelve mowers, four lawn and garden tractors, tractors, blowers, spreaders, aerators, shovels, hoses, various landscaping tools, and four snow plows.
9. The Petitioners must obtain a commercial access permit from the State Highway Administration and improve the existing 20-foot-wide service driveway onto MD 108 to a 25-foot width for a distance of 30 feet from MD 108, and make any other improvements in the driveway required by SHA's permit specifications.
10. There must be no identification sign placed on the property.
11. The landscape contractor business must comply with Montgomery County's Noise Ordinance.
12. Visitors to the site in connection with the proposed use must be limited only to the employees of the landscape contractor business. All business arrangements including consultation and sales meetings that require the physical presence of customers must be conducted off-site.
13. A six-foot privacy fence, extending 105 feet on the southern side of the storage area and 213 feet on the northeastern side of the storage area, shall be maintained.
14. Eight parking spaces shall be located along the six-foot privacy fence and at least two spaces inside the storage and maintenance building, to be used for employee and truck parking during

the day and overnight.

15. No wholesale or retail horticultural nursery, or mulch/compost manufacturing operation, shall be conducted on the property. Plants, mulch and topsoil are to be stored on site in bags behind the six-foot privacy fence. There should be no storage of chemicals, pesticides, manure or debris on site.
16. Landscaping on the site must be in accordance with the revised Landscape & Lighting plan (Exhibit 28(c)), approved by the Board of Appeals, including bushes separating the service and residential driveways and Leyland Cypress screening along the property lines. Vehicles servicing the landscaping operation may use only the service driveway.
17. Petitioners must apply for subdivision in a form authorized by the Planning Board, and approval of subdivision for the subject site by the Planning Board is a condition of the special exception.
18. The Petitioners shall submit all subsequent government agency approvals related to development on the site to the Board of Appeals to be included in the record of the case, including but not limited to Planning Board approvals of subdivision, the Final Forest Conservation Plan and Category 1 Conservation Easement, and State Highway Administration permits regarding access onto MD 108.
19. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements

Dated: July 10, 2007

Respectfully submitted,

Martin L. Grossman
Hearing Examiner